(2)

No. 92-235

Supreme Court, U.S.
FILED
NOV 2 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

KAY BELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
ROBERT S. MUELLER, III
Assistant Attorney General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the district court erred in permitting the government to withdraw a stipulation to the admission of a hearsay statement favorable to petitioner.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Brady v. *Maryland*, 373 U.S. 83 (1963)	4
California v. *Trombetta*, 467 U.S. 479 (1984)	4
Santobello v. *New York*, 404 U.S. 257 (1971)	5
United States v. *Agurs*, 427 U.S. 97 (1976)	4

Statute and rules:

21 U.S.C. 846	2
Fed. R. Evid.:	
Rule 104(a)	5
Rule 802	5

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-235

KAY BELL, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 955 F.2d 479.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1992. A petition for rehearing was denied on April 14, 1992. Pet. App. 32a-33a. The petition for a writ of certiorari was filed on August 4, 1992, and is therefore untimely under Rule 13.1 of the Rules of this Court. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Illinois, petitioner was convicted of conspiracy to distribute marijuana, in violation of 21 U.S.C. 846. He was sentenced to 25 years' imprisonment. The court of appeals affirmed.

1. The scope of the marijuana importation conspiracy in which petitioner was involved is summarized in the court of appeals' opinion. Pet. App. 3a-5a. The evidence showed that the conspiracy entailed the importation of massive amounts of marijuana on at least seven occasions, and that the conspirators grossed hundreds of millions of dollars as a result. Petitioner was directly involved in the importation of one barge load of 147,000 pounds of marijuana and a second barge load of 130,000 pounds of marijuana. Petitioner owned a tugboat and a business called the Harbor Sand and Gravel Yard in San Francisco, which were used in unloading the marijuana shipments; petitioner also assisted in arranging for the distribution of the marijuana from that location. The conspiracy gross-ed almost $85 million from the two shipments in which petitioner was involved. Pet. App. 4a-5a.

2. Before trial, William Palumbo, one of petitioner's co-conspirators and co-defendants, agreed to give to the government a proffer of his testimony, apparently because he wanted to demonstrate that he would be a cooperative witness if he were granted immunity. The FBI agent who took the proffer from Palumbo stated that Palumbo "told me that [petitioner] was unaware of any illegalities." At a pretrial hearing on whether Palumbo's trial should be severed from that

of the other defendants, counsel for the government stated, "I'll stipulate that statement that was made by Mr. Palumbo * * * in Mr. Bell's behalf can be introduced for Mr. Bell." The government made this offer to stipulate because it hoped to prevent the severance of Palumbo's trial. Counsel for petitioner, who had not previously participated in the discussion, responded: "We will accept that stipulation, Your Honor." The district court stated, "okay." The hearing concluded without further discussion of the stipulation. Shortly after the hearing, Palumbo's motion for a severance was granted. Pet. App. 26a-27a.

During trial, petitioner moved for the admission of Palumbo's out-of-court statement. The government objected. The district court noted that the government's offer to stipulate to the statement's admission had been made on the premise that Palumbo was to be tried with the other defendants. Because Palumbo's trial had been severed, that premise no longer was valid, and the court accordingly thought that there was no reason to enforce the stipulation. Since Palumbo's statement was inadmissible hearsay, the district court excluded it. Pet. App. 25a-27a.

3. The court of appeals affirmed, rejecting petitioner's claim that the district court abused its discretion in permitting the government to withdraw its stipulation. Pet. App. 25a-28a. The court concluded that, although the government had stipulated to the admission of Palumbo's statement, that stipulation was conditioned on petitioner and Palumbo being jointly tried. The district court therefore did not abuse its discretion in determining that changed

circumstances, namely the severance of Palumbo's trial, justified voiding the stipulation. In addition, although the court of appeals recognized that admission of Palumbo's statement would have been helpful to petitioner, the court concluded that its admission "would not have made a difference in the outcome of the trial." *Id.* at 27a-28a.

ARGUMENT

Petitioner contends (Pet. 16) that it was constitutional error for the district court not to enforce the government's stipulation to admit Palumbo's out-of-court statement.

1. Petitioner mistakenly relies (Pet. 12-16) on the government's duty to preserve evidence useful to the defense, see, *e.g.*, *California* v. *Trombetta*, 467 U.S. 479 (1984), and its duty to reveal exculpatory material to the defense, see *Brady* v. *Maryland*, 373 U.S. 83 (1963); *United States* v. *Agurs*, 427 U.S. 97 (1976). Petitioner cannot contend that the government breached any such duties in this case. The cases cited by petitioner are inapposite, because they do not suggest that a criminal defendant has a right to introduce arguably exculpatory evidence even if it is inadmissible under the Rules of Evidence, and do not stand for the proposition that the government must acquiesce in the admission of inadmissible evidence.*

---

* None of the cases cited by petitioner (Pet. 11-13) dealing with the right of criminal defendants to introduce evidence suggest in any way that the rule against the admission of hearsay testimony is unconstitutional when the evidence at issue is exculpatory.

Even if the government should have been held to its understanding not to object to the admission of the hearsay statement, petitioner would not have been entitled to its admission into evidence. Under the language of Fed. R. Evid. 802—which provides that "[h]earsay is not admissible except as provided by these rules"—it would not have been error for the district court to refuse to admit Palumbo's hearsay statement even if the government had failed to object to its admission. See Fed. R. Evid. 104(a) ("the admissibility of evidence shall be determined by the court").

2. The district court's decision to release the government from its stipulation was based on the premise underlying that stipulation. The district court determined that the government offered the stipulation on the understanding that Palumbo would be jointly tried with the other defendants. When Palumbo's motion for a severance was granted, the condition on which the government offered to stipulate failed, and the district court determined that it would no longer be fair to hold the government to the stipulation. The court of appeals' conclusion (see Pet. App. 27a-28a) that the district court did not abuse its discretion in so concluding does not warrant this Court's review.

Relying on this Court's decision in *Santobello* v. *New York*, 404 U.S. 257 (1971), petitioner claims (Pet. 16) that the government should have been held to its promise to stipulate to the admission of Palumbo's statement. *Santobello* is inapposite, however, because unlike the situation in that case, nothing in the record here suggests that petitioner detrimentally

relied on the government's representations. Petitioner gave nothing in return for the government's stipulation, and he was in no different position after the government withdrew the stipulation than he would have been if the stipulation had never been made.

Petitioner nonetheless claims (Pet. 16) that the government's offer to stipulate "operated as an inducement of the petitioner not only to not file for severance but to not pursue and secure the testimony of the co-defendant Palumbo." Those assertions find no support in the record.

Although some of petitioner's co-defendants sought a severance, petitioner did not. Petitioner made the decision not to seek a severance, however, prior to the time the government stipulated not to object to the admission of Palumbo's statement. That decision therefore could not have been motivated by the government's later stipulation. In any event, Palumbo's hearsay statement was equally inadmissible whether petitioner was jointly tried with Palumbo or separately tried. Nor does petitioner suggest any reason that his desire to introduce the statement could have served as a basis for the district court to grant him a severance.

Petitioner's claim that the government's stipulation deterred him from pursuing and securing Palumbo's testimony is also without merit. After the district court released the government from its stipulation, petitioner remained free to seek Palumbo's testimony, but there is no evidence that he did so. Moreover, as petitioner acknowledges (Pet. 19), Palumbo could not be compelled to testify without a

grant of immunity, and the government was not prepared to grant immunity to an indicted defendant. In short, the government's stipulation had no impact on petitioner's ability to persuade Palumbo to testify on his behalf.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

RICHARD A. FRIEDMAN
Attorney

NOVEMBER 1992